



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2010-1014; FRL-9708-7]

Approval and Promulgation of Implementation Plans; Kentucky; 110(a)(1) and (2) Infrastructure Requirements for the 1997 annual and 2006 24-hour Fine Particulate Matter National Ambient Air Quality Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to approve in part, and conditionally approve in part, the State Implementation Plan (SIP) revisions, submitted by the Commonwealth of Kentucky through the Kentucky Energy and Environment Cabinet, Division for Air Quality (DAQ), as demonstrating that the Commonwealth meets the requirements of sections 110(a)(1) and (2) of the Clean Air Act (CAA or Act) for the 1997 annual and 2006 24-hour fine particulate matter (PM_{2.5}) national ambient air quality standards (NAAQS). Kentucky certified that the Kentucky SIP contains provisions that ensure the 1997 annual and 2006 24-hour PM_{2.5} NAAQS are implemented, enforced, and maintained in Kentucky (hereafter referred to as “infrastructure submission”). EPA is now taking three related actions on Kentucky DAQ’s infrastructure submissions for the Commonwealth. First, EPA is proposing to determine that Kentucky DAQ’s infrastructure submissions, provided to EPA on August 26, 2008, and July 17, 2012, satisfy certain required infrastructure elements for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. Second, EPA is proposing to approve several Kentucky Revised Statutes (KRS) into the SIP to address element

110(a)(2)(E)(ii), that relates to state board requirements. Third, with respect to sections 110(a)(2)(C) and 110(a)(2)(J) as they relate to PSD requirements, EPA is proposing to conditionally approve the SIP submissions as meeting these requirements.

DATES: Written comments must be received on or before [insert date 30 days after date of publication in the Federal Register].

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2010-1014, by one of the following methods:

1. www.regulations.gov: Follow the on-line instructions for submitting comments.
2. E-mail: R4-RDS@epa.gov.
3. Fax: (404) 562-9019.
4. Mail: "EPA-R04-OAR-2010-1014," Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960.
5. Hand Delivery or Courier: Lynorae Benjamin, Chief, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Such deliveries are only accepted during the Regional Office's normal hours of operation. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding federal holidays.

Instructions: Direct your comments to Docket ID No. EPA-R04-OAR-2010-1014. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit through www.regulations.gov or e-mail, information that you consider to be CBI or otherwise protected. The www.regulations.gov website is an “anonymous access” system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA’s public docket visit the EPA Docket Center homepage at <http://www.epa.gov/epahome/dockets.htm>.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. EPA requests that if at all possible, you contact the person listed in the **FOR FURTHER INFORMATION CONTACT** section to schedule your inspection. The Regional Office's official hours of business are Monday through Friday, 8:30 to 4:30, excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Sean Lakeman, Regulatory Development Section, Air Planning Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. The telephone number is (404) 562-9043. Mr. Lakeman can be reached via electronic mail at lakeman.sean@epa.gov.

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I. Background

On July 18, 1997 (62 FR 38652), EPA established an annual PM_{2.5} NAAQS at 15.0 micrograms per cubic meter (µg/m³) based on a 3-year average of annual mean PM_{2.5} concentrations. At that time, EPA also established a 24-hour NAAQS of 65 µg/m³. *See* 40 CFR 50.7. On October 17, 2006 (71 FR 61144), EPA retained the 1997 annual PM_{2.5} NAAQS at 15.0 µg/m³ based on a 3-year average of annual mean PM_{2.5} concentrations, and promulgated a new 24-hour NAAQS of 35 µg/m³ based on a 3-year average of the 98th percentile of 24-hour concentrations. By statute, SIPs meeting the requirements of sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised NAAQS. Sections 110(a)(1) and (2) require states to address basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the NAAQS. States were required to submit such SIPs to EPA no later than July 2000 for the 1997 annual PM_{2.5} NAAQS, no later than October 2009 for the 2006 24-hour PM_{2.5} NAAQS.

On March 4, 2004, Earthjustice submitted a notice of intent to sue related to EPA's failure to issue findings of failure to submit related to the "infrastructure" requirements for the 1997 annual PM_{2.5} NAAQS. On March 10, 2005, EPA entered into a consent decree with Earthjustice which required EPA, among other things, to complete a Federal Register notice announcing EPA's determinations pursuant to section 110(k)(1)(B) as to whether each state had made complete submissions to meet the requirements of section 110(a)(2) for the 1997 PM_{2.5} NAAQS by October 5, 2008. In accordance with the consent decree, EPA made completeness findings for each state based upon what the Agency received from each state for the 1997 PM_{2.5} NAAQS as of October 3, 2008.

On October 22, 2008, EPA published a final rulemaking entitled “Completeness Findings for Section 110(a) State Implementation Plans Pertaining to the Fine Particulate Matter (PM_{2.5}) NAAQS” making a finding that each state had submitted or failed to submit a complete SIP that provided the basic program elements of section 110(a)(2) necessary to implement the 1997 PM_{2.5} NAAQS (*see* 73 FR 62902). For those states that did receive findings, the findings of failure to submit for all or a portion of a state’s implementation plan established a 24-month deadline for EPA to promulgate a federal implementation plan to address the outstanding SIP elements unless, prior to that time, the affected states submitted, and EPA approved, the required SIPs. The findings that all or portions of a state’s submission are complete established a 12-month deadline for EPA to take action upon the complete SIP elements in accordance with section 110(k).

Kentucky’s infrastructure submissions were received by EPA on August 26, 2008, for the 1997 annual PM_{2.5} NAAQS, and on July 17, 2012,¹ for the 2006 24-hour PM_{2.5} NAAQS. The August 26, 2008, submission was determined to be complete on February 26, 2009. Kentucky was among other states that did not receive findings of failure to submit because it had provided a complete submission to EPA to address the infrastructure elements for the 1997 PM_{2.5} NAAQS by October 3, 2008.

On July 6, 2011, WildEarth Guardians and Sierra Club filed an amended complaint related to EPA’s failure to take action on the SIP revision related to the “infrastructure” requirements for the 2006 24-hour PM_{2.5} NAAQS. On October 20, 2011, EPA entered into a consent decree with WildEarth Guardians and Sierra Club which required EPA, among other things, to complete a Federal Register notice of the Agency’s final action either approving,

¹ On July 17, 2012, Kentucky withdrew its September 8, 2009, 110(a)(1)-(2) infrastructure submission addressing the 8-hour ozone, PM_{2.5} and Lead NAAQS. Kentucky replaced its September 8, 2009, 110(a)(1)-(2) infrastructure submission with a submission provided on July 17, 2012.

disapproving, or approving in part and disapproving in part the Kentucky 2006 24-hour PM_{2.5} NAAQS Infrastructure SIP revision addressing the applicable requirements of sections 110(a)(2)(A)-(H), (J)-(M), except for section 110(a)(2)(C) the nonattainment area requirements and section 110(a)(2)(D)(i)(II) visibility requirements, by September 30, 2012. On July 20, 2011, EPA published a final rulemaking disapproving the interstate transport requirements for section 110(a)(2)(D)(i) for the 2006 24-hour PM_{2.5} NAAQS for Kentucky. *See* 76 FR 43136.

Today's proposal addresses three related actions. First, EPA is proposing to determine that, as described in its infrastructure submissions, Kentucky's SIP meets the section 110(a)(2) infrastructure requirements for both the 1997 annual and 2006 24-hour PM_{2.5} NAAQS with the exception of elements 110(a)(2)(C) respecting nonattainment area and PSD requirements, 110(a)(2)(D)(i) respecting interstate transport, and 110(a)(2)(J) respecting PSD requirements. For the infrastructure elements except for 110(a)(2)(C), 110(a)(2)(D)(i) and 110(a)(2)(J), as noted above, EPA is proposing to determine that Kentucky's already approved SIP meets certain CAA requirements. Second, EPA is proposing to approve Kentucky's July 17, 2012, submission requesting approval of KRS Chapters 11A.020, 11A.030, 11A.040 224.10-020 and 224.10-100 into the SIP to address element 110(a)(2)(E)(ii). Third, with respect to elements 110(a)(2)(C) and 110(a)(2)(J) as they both relate to PSD requirements, EPA is proposing to conditionally approve these sub-elements.²

II. What Elements are Required Under Sections 110(a)(1) and (2)?

Section 110(a) of the CAA requires states to submit SIPs to provide for the implementation, maintenance, and enforcement of a new or revised NAAQS within three years

² As discussed below in Section IV of this proposed rule, EPA's proposed action to approve infrastructure elements 110(a)(2)(C) and 110(a)(2)(J) respecting PSD requirements, is contingent upon final approval of Kentucky's PM_{2.5} NSR program.

following the promulgation of such NAAQS, or within such shorter period as EPA may prescribe. Section 110(a) imposes the obligation upon states to make a SIP submission to EPA for a new or revised NAAQS, but the contents of that submission may vary depending upon the facts and circumstances. In particular, the data and analytical tools available at the time the state develops and submits the SIP for a new or revised NAAQS affects the content of the submission. The contents of such SIP submissions may also vary depending upon what provisions the state's existing SIP already contains. In the case of the 1997 annual and 2006 24-hour PM_{2.5} NAAQS, some states may need to adopt language specific to the PM_{2.5} NAAQS to ensure that they have adequate SIP provisions to implement the PM_{2.5} NAAQS.

Section 110(a)(1) provides the procedural and timing requirements for SIPs. Section 110(a)(2) lists specific elements that states must meet for “infrastructure” SIP requirements related to a newly established or revised NAAQS. As mentioned above, these requirements include SIP infrastructure elements such as modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the NAAQS. The requirements that are the subject of this proposed rulemaking are listed below³ and in EPA's October 2, 2007, memorandum entitled “Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-Hour Ozone and PM_{2.5} National Ambient Air Quality Standards” and September 25, 2009, memorandum entitled “Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM_{2.5}) National Ambient Air Quality Standards.”

³ Two elements identified in section 110(a)(2) are not governed by the three year submission deadline of section 110(a)(1) because SIPs incorporating necessary local nonattainment area controls are not due within three years after promulgation of a new or revised NAAQS, but rather due at the time the nonattainment area plan requirements are due pursuant to section 172. These requirements are: (1) submissions required by section 110(a)(2)(C) to the extent that subsection refers to a permit program as required in part D Title I of the CAA, and (2) submissions required by section 110(a)(2)(I) which pertain to the nonattainment planning requirements of part D, Title I of the CAA. Today's proposed rulemaking does not address infrastructure elements related to section 110(a)(2)(I) but does provide detail on how Kentucky's SIP addresses 110(a)(2)(C).

- 110(a)(2)(A): Emission limits and other control measures.
- 110(a)(2)(B): Ambient air quality monitoring/data system.
- 110(a)(2)(C): Program for enforcement of control measures.⁴
- 110(a)(2)(D): Interstate transport.⁵
- 110(a)(2)(E): Adequate resources.
- 110(a)(2)(F): Stationary source monitoring system.
- 110(a)(2)(G): Emergency power.
- 110(a)(2)(H): Future SIP revisions.
- 110(a)(2)(I): Areas designated nonattainment and meet the applicable requirements of part D.⁶
- 110(a)(2)(J): Consultation with government officials; public notification; and PSD and visibility protection.
- 110(a)(2)(K): Air quality modeling/data.
- 110(a)(2)(L): Permitting fees.
- 110(a)(2)(M): Consultation/participation by affected local entities.

⁴This rulemaking only addresses requirements for this element as they relate to attainment areas.

⁵ Today's proposed rule does not address element 110(a)(2)(D)(i) (Interstate Transport) for the 1997 and 2006 PM_{2.5} NAAQS. Interstate transport requirements were formerly addressed by Kentucky consistent with the Clean Air Interstate Rule (CAIR). On December 23, 2008, CAIR was remanded by the D.C. Circuit Court of Appeals, without vacatur, back to EPA. *See North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). Prior to this remand, EPA took final action to approve Kentucky SIP revision, which was submitted to comply with CAIR. *See* 72 FR 56623 (October 4, 2007). In so doing, Kentucky CAIR SIP revision addressed the interstate transport provisions in section 110(a)(2)(D)(i) for the 1997 PM_{2.5} NAAQS. In response to the remand of CAIR, EPA has recently finalized a new rule to address the interstate transport of nitrogen oxides and sulfur oxides in the eastern United States. *See* 76 FR 48208 (August 8, 2011) (Transport Rule). That rule was recently stayed by the D.C. Circuit Court of Appeals. EPA's action on element 110(a)(2)(D)(i) will be addressed in a separate action.

⁶ This requirement was inadvertently omitted from EPA's October 2, 2007, memorandum entitled "Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-Hour Ozone and PM_{2.5} National Ambient Air Quality Standards," and the September 25, 2009, memorandum entitled "Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 2006 Fine Particle (PM_{2.5}) National Ambient Air Quality Standards," but as mentioned above is not relevant to today's proposed rulemaking.

III. Scope of Infrastructure SIPs

EPA is currently acting upon SIPs that address the infrastructure requirements of CAA section 110(a)(1) and (2) for ozone and PM_{2.5} NAAQS for various states across the country. Commenters on EPA's recent proposals for some states raised concerns about EPA statements that it was not addressing certain substantive issues in the context of acting on those infrastructure SIP submissions.⁷ Those Commenters specifically raised concerns involving provisions in existing SIPs and with EPA's statements in other proposals that it would address two issues separately and not as part of actions on the infrastructure SIP submissions: (i) existing provisions related to excess emissions during periods of start-up, shutdown, or malfunction (SSM) at sources, that may be contrary to the CAA and EPA's policies addressing such excess emissions; and (ii) existing provisions related to "director's variance" or "director's discretion" that purport to permit revisions to SIP approved emissions limits with limited public process or without requiring further approval by EPA, that may be contrary to the CAA (director's discretion). EPA notes that there are two other substantive issues for which EPA likewise stated in other proposals that it would address separately: (i) existing provisions for minor source NSR programs that may be inconsistent with the requirements of the CAA and EPA's regulations that pertain to such programs (minor source NSR); and (ii) existing provisions for PSD programs that may be inconsistent with current requirements of EPA's "Final NSR Improvement Rule," 67 FR 80186 (December 31, 2002), as amended by 72 FR 32526 (June 13, 2007) (NSR Reform). In light of the comments, EPA believes that its statements in various proposed actions on infrastructure SIPs with respect to these four individual issues should be

⁷ See Comments of Midwest Environmental Defense Center, dated May 31, 2011. Docket # EPA-R05-OAR-2007-1179 (adverse comments on proposals for three states in Region 5). EPA notes that these public comments on another proposal are not relevant to this rulemaking and do not have to be directly addressed in this rulemaking. EPA will respond to these comments in the appropriate rulemaking action to which they apply.

explained in greater depth. It is important to emphasize that EPA is taking the same position with respect to these four substantive issues in this action on the infrastructure SIPs for the 1997 and 2006 PM_{2.5} NAAQS from Kentucky.

EPA intended the statements in the other proposals concerning these four issues merely to be informational and to provide general notice of the potential existence of provisions within the existing SIPs of some states that might require future corrective action. EPA did not want states, regulated entities, or members of the public to be under the misconception that the Agency's approval of the infrastructure SIP submission of a given state should be interpreted as a re-approval of certain types of provisions that might exist buried in the larger existing SIP for such state. Thus, for example, EPA explicitly noted that the Agency believes that some states may have existing SIP approved SSM provisions that are contrary to the CAA and EPA policy, but that "in this rulemaking, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during SSM of operations at facilities." EPA further explained, for informational purposes, that "EPA plans to address such State regulations in the future." EPA made similar statements, for similar reasons, with respect to the director's discretion, minor source NSR, and NSR Reform issues. EPA's objective was to make clear that approval of an infrastructure SIP for these ozone and PM_{2.5} NAAQS should not be construed as explicit or implicit re-approval of any existing provisions that relate to these four substantive issues. EPA is reiterating that position in this action on the infrastructure SIP for Kentucky.

Unfortunately, the Commenters and others evidently interpreted these statements to mean that EPA considered action upon the SSM provisions and the other three substantive issues to be integral parts of acting on an infrastructure SIP submission, and therefore that EPA was merely postponing taking final action on the issues in the context of the infrastructure SIPs. This was

not EPA's intention. To the contrary, EPA only meant to convey its awareness of the potential for certain types of deficiencies in existing SIPs and to prevent any misunderstanding that it was reapproving any such existing provisions. EPA's intention was to convey its position that the statute does not require that infrastructure SIPs address these specific substantive issues in existing SIPs and that these issues may be dealt with separately, outside the context of acting on the infrastructure SIP submission of a state. To be clear, EPA did not mean to imply that it was not taking a full final agency action on the infrastructure SIP submission with respect to any substantive issue that EPA considers to be a required part of acting on such submissions under section 110(k) or under section 110(c). Given the confusion evidently resulting from EPA's statements in those other proposals, however, we want to explain more fully the Agency's reasons for concluding that these four potential substantive issues in existing SIPs may be addressed separately from actions on infrastructure SIP submissions.

The requirement for the SIP submissions at issue arises out of CAA section 110(a)(1). That provision requires that states must make a SIP submission "within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof)" and that these SIPs are to provide for the "implementation, maintenance, and enforcement" of such NAAQS. Section 110(a)(2) includes a list of specific elements that "[e]ach such plan" submission must meet. EPA has historically referred to these particular submissions that states must make after the promulgation of a new or revised NAAQS as "infrastructure SIPs." This specific term does not appear in the statute, but EPA uses the term to distinguish this particular type of SIP submission designed to address basic structural requirements of a SIP from other types of SIP submissions designed to address other different requirements, such as "nonattainment SIP" submissions required to address the

nonattainment planning requirements of part D, “regional haze SIP” submissions required to address the visibility protection requirements of CAA section 169A, NSR permitting program submissions required to address the requirements of part D, and a host of other specific types of SIP submissions that address other specific matters.

Although section 110(a)(1) addresses the timing and general requirements for these infrastructure SIPs, and section 110(a)(2) provides more details concerning the required contents of these infrastructure SIPs, EPA believes that many of the specific statutory provisions are facially ambiguous. In particular, the list of required elements provided in section 110(a)(2) contains a wide variety of disparate provisions, some of which pertain to required legal authority, some of which pertain to required substantive provisions, and some of which pertain to requirements for both authority and substantive provisions.⁸ Some of the elements of section 110(a)(2) are relatively straightforward, but others clearly require interpretation by EPA through rulemaking, or recommendations through guidance, in order to give specific meaning for a particular NAAQS.⁹

Notwithstanding that section 110(a)(2) provides that “each” SIP submission must meet the list of requirements therein, EPA has long noted that this literal reading of the statute is internally inconsistent, insofar as section 110(a)(2)(I) pertains to nonattainment SIP requirements

⁸ For example, section 110(a)(2)(E) provides that states must provide assurances that they have adequate legal authority under state and local law to carry out the SIP; section 110(a)(2)(C) provides that states must have a substantive program to address certain sources as required by part C of the CAA; section 110(a)(2)(G) provides that states must have both legal authority to address emergencies and substantive contingency plans in the event of such an emergency.

⁹ For example, section 110(a)(2)(D)(i) requires EPA to be sure that each state’s implementation plan contains adequate provisions to prevent significant contribution to nonattainment of the NAAQS in other states. This provision contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution. See “Rule To Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NOx SIP Call; Final Rule,” 70 FR 25162 (May 12, 2005) (defining, among other things, the phrase “contribute significantly to nonattainment”).

that could not be met on the schedule provided for these SIP submissions in section 110(a)(1).¹⁰

This illustrates that EPA must determine which provisions of section 110(a)(2) may be applicable for a given infrastructure SIP submission. Similarly, EPA has previously decided that it could take action on different parts of the larger, general “infrastructure SIP” for a given NAAQS without concurrent action on all subsections, such as section 110(a)(2)(D)(i), because the Agency bifurcated the action on these latter “interstate transport” provisions within section 110(a)(2) and worked with states to address each of the four prongs of section 110(a)(2)(D)(i) with substantive administrative actions proceeding on different tracks with different schedules.¹¹ This illustrates that EPA may conclude that subdividing the applicable requirements of section 110(a)(2) into separate SIP actions may sometimes be appropriate for a given NAAQS where a specific substantive action is necessitated, beyond a mere submission addressing basic structural aspects of the state’s implementation plans. Finally, EPA notes that not every element of section 110(a)(2) would be relevant, or as relevant, or relevant in the same way, for each new or revised NAAQS and the attendant infrastructure SIP submission for that NAAQS. For example, the monitoring requirements that might be necessary for purposes of section 110(a)(2)(B) for one NAAQS could be very different than what might be necessary for a different pollutant. Thus, the content of an infrastructure SIP submission to meet this element from a state might be very different for an entirely new NAAQS, versus a minor revision to an existing NAAQS.¹²

¹⁰ See *Id.*, 70 FR 25162, at 63 – 65 (May 12, 2005) (explaining relationship between timing requirement of section 110(a)(2)(D) versus section 110(a)(2)(I)).

¹¹ EPA issued separate guidance to states with respect to SIP submissions to meet section 110(a)(2)(D)(i) for the 1997 ozone and 1997 PM_{2.5} NAAQS. See “Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and PM_{2.5} National Ambient Air Quality Standards,” from William T. Harnett, Director Air Quality Policy Division OAQPS, to Regional Air Division Director, Regions I-X, dated August 15, 2006.

¹² For example, implementation of the 1997 PM_{2.5} NAAQS required the deployment of a system of new monitors to measure ambient levels of that new indicator species for the new NAAQS.

Similarly, EPA notes that other types of SIP submissions required under the statute also must meet the requirements of section 110(a)(2), and this also demonstrates the need to identify the applicable elements for other SIP submissions. For example, nonattainment SIPs required by part D likewise have to meet the relevant subsections of section 110(a)(2) such as section 110(a)(2)(A) or (E). By contrast, it is clear that nonattainment SIPs would not need to meet the portion of section 110(a)(2)(C) that pertains to part C, *i.e.*, the PSD requirements applicable in attainment areas. Nonattainment SIPs required by part D also would not need to address the requirements of section 110(a)(2)(G) with respect to emergency episodes, as such requirements would not be limited to nonattainment areas. As this example illustrates, each type of SIP submission may implicate some subsections of section 110(a)(2) and not others.

Given the potential for ambiguity of the statutory language of section 110(a)(1) and (2), EPA believes that it is appropriate for EPA to interpret that language in the context of acting on the infrastructure SIPs for a given NAAQS. Because of the inherent ambiguity of the list of requirements in section 110(a)(2), EPA has adopted an approach in which it reviews infrastructure SIPs against this list of elements “as applicable.” In other words, EPA assumes that Congress could not have intended that each and every SIP submission, regardless of the purpose of the submission or the NAAQS in question, would meet each of the requirements, or meet each of them in the same way. EPA elected to use guidance to make recommendations for infrastructure SIPs for these ozone and PM_{2.5} NAAQS.

On October 2, 2007, EPA issued guidance making recommendations for the infrastructure SIP submissions for both the 1997 8-hour ozone NAAQS and the 1997 PM_{2.5}

NAAQS.¹³ Within this guidance document, EPA described the duty of states to make these submissions to meet what the Agency characterized as the “infrastructure” elements for SIPs, which it further described as the “basic SIP requirements, including emissions inventories, monitoring, and modeling to assure attainment and maintenance of the standards.”¹⁴ As further identification of these basic structural SIP requirements, “attachment A” to the guidance document included a short description of the various elements of section 110(a)(2) and additional information about the types of issues that EPA considered germane in the context of such infrastructure SIPs. EPA emphasized that the description of the basic requirements listed on attachment A was not intended “to constitute an interpretation of” the requirements, and was merely a “brief description of the required elements.”¹⁵ EPA also stated its belief that with one exception, these requirements were “relatively self explanatory, and past experience with SIPs for other NAAQS should enable States to meet these requirements with assistance from EPA Regions.”¹⁶ However, for the one exception to that general assumption (*i.e.*, how states should proceed with respect to the requirements of section 110(a)(2)(G) for the 1997 PM_{2.5} NAAQS), EPA gave much more specific recommendations. But for other infrastructure SIP submittals, and for certain elements of the submittals for the 1997 PM_{2.5} NAAQS, EPA assumed that each state would work with its corresponding EPA regional office to refine the scope of a state’s submittal based on an assessment of how the requirements of section 110(a)(2) should

¹³ See “Guidance on SIP Elements Required Under Section 110(a)(1) and (2) for the 1997 8-hour Ozone and PM_{2.5} National Ambient Air Quality Standards,” from William T. Harnett, Director Air Quality Policy Division, to Air Division Directors, Regions I – X, dated October 2, 2007 (the “2007 Guidance”).

¹⁴ *Id.*, at page 2.

¹⁵ *Id.*, at attachment A, page 1.

¹⁶ *Id.*, at page 4. In retrospect, the concerns raised by the Commenters with respect to EPA’s approach to some substantive issues indicates that the statute is not so “self explanatory,” and indeed is sufficiently ambiguous that EPA needs to interpret it in order to explain why these substantive issues do not need to be addressed in the context of infrastructure SIPs and may be addressed at other times and by other means.

reasonably apply to the basic structure of the state's implementation plans for the NAAQS in question.

On September 25, 2009, EPA issued guidance to make recommendations to states with respect to the infrastructure SIPs for the 2006 PM_{2.5} NAAQS.¹⁷ In the 2009 Guidance, EPA addressed a number of additional issues that were not germane to the infrastructure SIPs for the 1997 8-hour ozone and 1997 PM_{2.5} NAAQS, but were germane to these SIP submissions for the 2006 PM_{2.5} NAAQS (e.g., the requirements of section 110(a)(2)(D)(i) that EPA had bifurcated from the other infrastructure elements for those specific 1997 ozone and PM_{2.5} NAAQS). Significantly, neither the 2007 Guidance nor the 2009 Guidance explicitly referred to the SSM, director's discretion, minor source NSR, or NSR Reform issues as among specific substantive issues EPA expected states to address in the context of the infrastructure SIPs, nor did EPA give any more specific recommendations with respect to how states might address such issues even if they elected to do so. The SSM and director's discretion issues implicate section 110(a)(2)(A), and the minor source NSR and NSR Reform issues implicate section 110(a)(2)(C). In the 2007 Guidance and the 2009 Guidance, however, EPA did not indicate to states that it intended to interpret these provisions as requiring a substantive submission to address these specific issues in existing SIP provisions in the context of the infrastructure SIPs for these NAAQS. Instead, EPA's 2007 Guidance merely indicated its belief that the states should make submissions in which they established that they have the basic SIP structure necessary to implement, maintain, and enforce the NAAQS. EPA believes that states can establish that they have the basic SIP structure, notwithstanding that there may be potential deficiencies within the existing SIP. Thus,

¹⁷ See "Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle (PM_{2.5}) National Ambient Air Quality Standards (NAAQS)," from William T. Harnett, Director Air Quality Policy Division, to Regional Air Division Directors, Regions I - X, dated September 25, 2009 (the "2009 Guidance").

EPA's proposals for other states mentioned these issues not because the Agency considers them issues that must be addressed in the context of an infrastructure SIP as required by section 110(a)(1) and (2), but rather because EPA wanted to be clear that it considers these potential existing SIP problems as separate from the pending infrastructure SIP actions. The same holds true for this action on the infrastructure SIPs for Kentucky.

EPA believes that this approach to the infrastructure SIP requirement is reasonable because it would not be feasible to read section 110(a)(1) and (2) to require a top to bottom, stem to stern, review of each and every provision of an existing SIP merely for purposes of assuring that the state in question has the basic structural elements for a functioning SIP for a new or revised NAAQS. Because SIPs have grown by accretion over the decades as statutory and regulatory requirements under the CAA have evolved, they may include some outmoded provisions and historical artifacts that, while not fully up to date, nevertheless may not pose a significant problem for the purposes of "implementation, maintenance, and enforcement" of a new or revised NAAQS when EPA considers the overall effectiveness of the SIP. To the contrary, EPA believes that a better approach is for EPA to determine which specific SIP elements from section 110(a)(2) are applicable to an infrastructure SIP for a given NAAQS, and to focus attention on those elements that are most likely to need a specific SIP revision in light of the new or revised NAAQS. Thus, for example, EPA's 2007 Guidance specifically directed states to focus on the requirements of section 110(a)(2)(G) for the 1997 PM_{2.5} NAAQS because of the absence of underlying EPA regulations for emergency episodes for this NAAQS and an anticipated absence of relevant provisions in existing SIPs.

Finally, EPA believes that its approach is a reasonable reading of section 110(a)(1) and (2) because the statute provides other avenues and mechanisms to address specific substantive

deficiencies in existing SIPs. These other statutory tools allow the Agency to take appropriate tailored action, depending upon the nature and severity of the alleged SIP deficiency. Section 110(k)(5) authorizes EPA to issue a “SIP call” whenever the Agency determines that a state’s SIP is substantially inadequate to attain or maintain the NAAQS, to mitigate interstate transport, or otherwise to comply with the CAA.¹⁸ Section 110(k)(6) authorizes EPA to correct errors in past actions, such as past approvals of SIP submissions.¹⁹ Significantly, EPA’s determination that an action on the infrastructure SIP is not the appropriate time and place to address all potential existing SIP problems does not preclude the Agency’s subsequent reliance on provisions in section 110(a)(2) as part of the basis for action at a later time. For example, although it may not be appropriate to require a state to eliminate all existing inappropriate director’s discretion provisions in the course of acting on the infrastructure SIP, EPA believes that section 110(a)(2)(A) may be among the statutory bases that the Agency cites in the course of addressing the issue in a subsequent action.²⁰

¹⁸ EPA has recently issued a SIP call to rectify a specific SIP deficiency related to the SSM issue. See, “Finding of Substantial Inadequacy of Implementation Plan; Call for Utah State Implementation Plan Revision,” 74 FR 21639 (April 18, 2011).

¹⁹ EPA has recently utilized this authority to correct errors in past actions on SIP submissions related to PSD programs. See “Limitation of Approval of Prevention of Significant Deterioration Provisions Concerning Greenhouse Gas Emitting-Sources in State Implementation Plans; Final Rule,” 75 FR 82536 (December 30, 2010). EPA has previously used its authority under CAA 110(k)(6) to remove numerous other SIP provisions that the Agency determined it had approved in error. See 61 FR 38664 (July 25, 1996) and 62 FR 34641 (June 27, 1997) (corrections to American Samoa, Arizona, California, Hawaii, and Nevada SIPs); 69 FR 67062 (November 16, 2004) (corrections to California SIP); and 74 FR 57051 (November 3, 2009) (corrections to Arizona and Nevada SIPs).

²⁰ EPA has recently disapproved a SIP submission from Colorado on the grounds that it would have included a director’s discretion provision inconsistent with CAA requirements, including section 110(a)(2)(A). See 75 FR 42342, 42344 (July 21, 2010) (proposed disapproval of director’s discretion provisions); 76 FR 4540 (January 26, 2011) (final disapproval of such provisions).

IV. What is EPA’s Analysis of How Kentucky Addressed the Elements of Sections 110(a)(1) and (2) “Infrastructure” Provisions?

Kentucky’s infrastructure submissions address the provisions of sections 110(a)(1) and (2) as described below.

1. 110(a)(2)(A): *Emission limits and other control measures*: Kentucky’s infrastructure submissions provide an overview of the provisions of the Kentucky Air Regulations relevant to air quality control regulations. Chapter 50 – *General Administrative Procedures*, of the Kentucky Air Regulations generally authorizes the Kentucky Environmental and Public Protection Cabinet to adopt rules for the control of air pollution, including those necessary to obtain EPA approval under section 110 of the CAA and details the authority and means with which DAQ can require testing and emissions verification. Chapter 51 – *Attainment and Maintenance of the National Ambient Air Quality Standards*, also includes references to rules adopted by Kentucky to control air pollution. Chapter 53 – *Ambient Air Quality Standards*, serves to establish the requirements for the prevention, abatement and control of air pollution. EPA has made the preliminary determination that the provisions contained in these regulations and Kentucky’s practices are adequate to protect the PM_{2.5} annual and 24-hour NAAQS in Kentucky.

In this action, EPA is not proposing to approve or disapprove any existing state provisions with regard to excess emissions during SSM of operations at a facility. EPA believes that a number of states have SSM provisions which are contrary to the CAA and existing EPA guidance, “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown” (September 20, 1999), and the Agency plans to address such state regulations in the future. In the meantime, EPA encourages any state having deficient

SSM provisions to take steps to correct it as soon as possible.

Additionally, in this action, EPA is not proposing to approve or disapprove any existing state rules with regard to director's discretion or variance provisions. EPA believes that a number of states have such provisions which are contrary to the CAA and existing EPA guidance (52 FR 45109 (November 24, 1987)), and the Agency plans to take action in the future to address such state regulations. In the meantime, EPA encourages any state having a director's discretion or variance provision which is contrary to the CAA and EPA guidance to take steps to correct the deficiency as soon as possible.

2. 110(a)(2)(B) *Ambient air quality monitoring/data system:* Chapter 50 – *General Administrative Procedures*, and Chapter 53 – *Ambient Air Quality Standards*, along with the Commonwealth's Network Description and Ambient Air Monitoring Network Plan, provide for an ambient air quality monitoring system in the State. Annually, EPA approves the ambient air monitoring network plan for the state agencies. On July 1, 2011, the Commonwealth of Kentucky submitted its plan to EPA. On October 20, 2011, EPA approved Kentucky's monitoring network plan. Kentucky's approved monitoring network plan can be accessed at www.regulations.gov using Docket ID No. EPA-R04-OAR-2010-1014. EPA has made the preliminary determination that Kentucky's SIP and practices are adequate for the ambient air quality monitoring and data systems related to the 1997 annual and 2006 24-hour PM_{2.5} NAAQS.

3. 110(a)(2)(C) *Program for enforcement of control measures including review of proposed new sources:* Chapter 51 – *Attainment and Maintenance of the National Ambient Air Quality Standards*, describes the permit requirements for new major sources or major modifications of existing sources in areas classified as attainment or unclassifiable under section 107(d)(1)(A)(ii)

or (iii) of the CAA. This ensures that sources in areas attaining the NAAQS at the time of designations prevent any significant deterioration in air quality. Chapter 51 also sets the permitting requirements for areas in or around nonattainment areas. On July 3, 2012, Kentucky submitted a letter to EPA to provide the schedule to address outstanding requirements promulgated in the NSR PM_{2.5} Rule related to the PM_{2.5} standard for their PSD program and committing to providing the necessary SIP revision to address these NSR PM_{2.5} Rule requirements.

Based on Kentucky's commitment, EPA is proposing to conditionally approve Kentucky's 110(a)(2)(C) infrastructure SIP consistent with section 110(k)(4) of the Act. EPA intends to move forward with finalizing the conditional approval consistent with section 110(k)(4) of the Act.

In this action, EPA is proposing to conditionally approve Kentucky's infrastructure SIP for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS with respect to the general requirement in section 110(a)(2)(C) to include a program in the SIP that regulates the modification and construction of any stationary source as necessary to assure that the NAAQS are achieved. EPA is not proposing to approve or disapprove the Commonwealth's existing minor NSR program itself to the extent that it is inconsistent with EPA's regulations governing this program. EPA believes that a number of states may have minor NSR provisions that are contrary to the existing EPA regulations for this program. EPA intends to work with states to reconcile state minor NSR programs with EPA's regulatory provisions for the program. The statutory requirements of section 110(a)(2)(C) provide for considerable flexibility in designing minor NSR programs, and EPA believes it may be time to revisit the regulatory requirements for this program to give the states an appropriate level of flexibility to design a program that meets their particular air quality

concerns, while assuring reasonable consistency across the country in protecting the NAAQS with respect to new and modified minor sources.

EPA is proposing to conditionally approve element 110(a)(2)(C) based on the commitment of the Commonwealth to submit SIP revisions to address the PM_{2.5} NSR requirements.

4. 110(a)(2)(D)(ii) *Interstate and International transport provisions:* In Chapter 51:017 – *Prevention of Significant Deterioration of air quality*, Kentucky outlines how it will notify neighboring states of potential impacts from new or modified sources. Kentucky does not have any pending obligation under sections 115 and 126 of the CAA. EPA has made the preliminary determination that Kentucky’s SIP and practices are adequate for insuring compliance with the applicable requirements relating to interstate and international pollution abatement for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS.

5. 110(a)(2)(E) *Adequate resources:* Section 110(a)(2)(E) requires that each implementation plan provide (i) necessary assurances that the State will have adequate personnel, funding, and authority under state law to carry out its implementation plan, (ii) that the State comply with the requirements respecting State Boards pursuant to section 128 of the Act, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provisions. EPA is proposing to approve Kentucky’s SIP as meeting the requirements of sub-elements 110(a)(2)(E)(i), (ii) and (iii).

In support of EPA’s proposal to approve elements 110(a)(2)(E)(i) and (iii), Kentucky DAQ’s infrastructure submissions demonstrate that it is responsible for promulgating rules and regulations for the NAAQS, emissions standards general policies, a system of permits, fee

schedules for the review of plans, and other planning needs. As evidence of the adequacy of Kentucky DAQ's resources with respect to sub-elements (i) and (iii), EPA submitted a letter to Kentucky on March 14, 2012, outlining 105 grant commitments and current status of these commitments for fiscal year 2011. The letter EPA submitted to Kentucky can be accessed at www.regulations.gov using Docket ID No. EPA-R04-OAR-2010-1014. Annually, states update these grant commitments based on current SIP requirements, air quality planning, and applicable requirements related to the NAAQS. There were no outstanding issues in relation to the SIP for fiscal year 2011, therefore, Kentucky's grants were finalized and closed out. EPA has made the preliminary determination that Kentucky has adequate resources for implementation of the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. In addition, the requirements of 110(a)(2)(E)(i) and (iii) are met when EPA performs a completeness determination for each SIP submittal. This determination ensures that each submittal provides evidence that adequate personnel, funding, and legal authority under State Law has been used to carry out the state's implementation plan and related issues. Kentucky's authority is included in all prehearings and final SIP submittal packages for approval by EPA. EPA has made the preliminary determination that Kentucky has adequate resources for implementation of the 1997 annual and 2006 24-hour PM_{2.5} NAAQS.

Section 110(a)(2)(E)(ii) requires that the Commonwealth comply with section 128 of the CAA. Section 128 requires that: 1) the majority of members of the state board or body which approves permits or enforcement orders represent the public interest and do not derive any significant portion of their income from persons subject to permitting or enforcement orders under the CAA; and 2) any potential conflicts of interest by such board or body, or the head of an executive agency with similar, powers be adequately disclosed. Kentucky's July 17, 2012, submission adequately demonstrated that Kentucky's SIP meets the applicable section 128

requirements pursuant to section 110(a)(2)(E)(ii). For purposes of section 128(a)(1), Kentucky has no boards or bodies with authority over air pollution permits or enforcement actions. Such matters are instead handled by the Director of Division for Air Quality. As such, a “board or body” is not responsible for approving permits or enforcement orders in Kentucky, and the requirements of section 128(a)(1) are not applicable. Regarding section 128(a)(2) (also applicable to the infrastructure SIP pursuant to section 110(a)(2)(E)(ii)), EPA is, through this notice, proposing to approve Kentucky’s July 17, 2012, SIP revision requesting incorporation of KRS Chapters 11A.020, 11A.030, 11A.040 and Chapters 224.10-020 and 224.10-100 into the SIP to address sub-element 110(a)(2)(E)(ii). KRS Chapters:

11A.020. *Public servant prohibited from certain conduct—Exception—Disclosure of personal or private interest;*

11A.030. *Considerations in determination to abstain from action on official decision—Advisory opinion,*

11A.030. *Acts prohibited for public servant or officer—exception;*

224.10-020. *Department within the cabinet—Offices and divisions within the departments-Appointments, and*

224.10-100. *Powers and duties of cabinet,*

require adequate disclosure of any potential conflicts of interest and meets the requirements of section 128(a)(2) of the Act. EPA has made the preliminary determination that, following final approval of these chapters in the SIP, Kentucky will have adequate resources for implementation of the 1997 annual and 2006 24-hour PM_{2.5} NAAQS.

6. 110(a)(2)(F) Stationary source monitoring system: Chapter 50 – *General Administrative Procedures* of the Kentucky Air Regulations describes how the major source and minor source

emission inventory programs collect emission data throughout the Commonwealth and ensure the quality of such data. Additionally, Kentucky is required to submit emissions data to EPA for purposes of the National Emissions Inventory (NEI). The NEI is EPA's central repository for air emissions data. EPA published the Air Emissions Reporting Rule (AERR) on December 5, 2008, which modified the requirements for collecting and reporting air emissions data (73 FR 76539). The AERR shortened the time states had to report emissions data from 17 to 12 months, giving states one calendar year to submit emissions data. All states are required to submit a comprehensive emissions inventory every three years and report emissions for certain larger sources annually through EPA's online Emissions Inventory System. States report emissions data for the six criteria pollutants and the precursors that form them – nitrogen oxides, sulfur dioxide, ammonia, lead, carbon monoxide, particulate matter, and volatile organic compounds. Many states also voluntarily report emissions of hazardous air pollutants. Kentucky made its latest update to the NEI on March 14, 2012. EPA compiles the emissions data, supplementing it where necessary, and releases it to the general public through the website <http://www.epa.gov/ttn/chief/eiinformation.html>. EPA has made the preliminary determination that Kentucky's SIP and practices are adequate for the stationary source monitoring systems related to the 1997 annual and 2006 24-hour PM_{2.5} NAAQS.

7. 110(a)(2)(G) *Emergency power:* Chapter 55 – *Emergency Episodes* contains provisions for the identification of air pollution emergency episodes. Episode criteria and emissions reduction plans are also covered in this regulation. These criteria have previously been approved by EPA. On September 25, 2009, EPA released the guidance entitled “Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particulate (PM_{2.5}) National Ambient Air Quality Standards (NAAQS).” This guidance clarified that “to address the

section 110(a)(2)(G) element, states with air quality control regions identified as either Priority I, IA, or Priority II by the ‘Prevention of Air Pollution Emergency Episodes’ rule at 40 CFR 51.150, must develop emergency episode contingency plans.” EPA’s September 25, 2009, guidance also states that “until the Agency finalized changes to the emergency episode regulation to establish for PM_{2.5} specific levels for classifying areas as Priority I, IA, or II for PM_{2.5}, and to establish a significant harm level (SHL)...,” it recommends that states with a 24-Hour PM_{2.5} concentration above 140 µg/m³ (using the most recent three years of data) develop an emergency episode plan. For states where this level has not been exceeded, the state can certify that it has appropriate general emergency powers to address PM_{2.5} related episodes, and that no specific emergency episode plans are needed at this time. On September 19, 2008, KYDAQ submitted a letter to EPA verifying that it is a Class III Priority Area and is exempt from adopting emergency episode plan for PM_{2.5} NAAQS. Kentucky had not previously public noticed its certification submissions (including the September 19, 2008, letter) with regard to 110(a)(2)(G) for the PM_{2.5} NAAQS. In May 2012, Kentucky public noticed its certification, and on July 17, 2012, submitted the public-noticed certification as a supplement to its original certification for element 110(a)(2)(G) for the PM_{2.5} NAAQS. EPA has made the preliminary determination that Kentucky’s SIP and practices are adequate for emergency powers related to the 1997 annual and 2006 24-hour PM_{2.5} NAAQS.

8. 110(a)(2)(H) *Future SIP revisions:* As previously discussed, DAQ is responsible for adopting air quality rules and revising SIPs as needed to attain or maintain the NAAQS.

Kentucky has the ability and authority to respond to calls for SIP revisions, and has provided a number of SIP revisions over the years for implementation of the PM NAAQS. Specific to the 1997 annual and 2006 24-hour PM_{2.5} NAAQS, Kentucky’s submissions have included:

- December 3, 2008, Louisville, Huntington-Ashland and Cincinnati PM_{2.5} Attainment Demonstrations;
- February 8, 2012, Huntington-Ashland 1997 Annual PM_{2.5} Redesignation Request and Maintenance Plan;
- March 5, 2012, Louisville 1997 Annual PM_{2.5} Redesignation Request and Maintenance Plan; and,

EPA has made the preliminary determination that Kentucky's SIP and practices adequately demonstrate a commitment to provide future SIP revisions related to the 1997 annual and 2006 24-hour PM_{2.5} NAAQS when necessary.

9. 110(a)(2)(J) (121 consultation) *Consultation with government officials:* Kentucky Air Regulations Chapter 50 - *General Administrative Procedures* of the Kentucky Air Regulations and Chapter 51 – *Attainment and Maintenance of the National Ambient Air Quality Standards* are responsible for consultation with government officials whose jurisdictions might be affected by SIP development activities. More specifically, Kentucky adopted state-wide consultation procedures for the implementation of transportation conformity which includes the consideration of the development of mobile inventories for SIP development. Required partners covered by Kentucky's consultation procedures include federal, state and local transportation and air quality agency officials. EPA approved Kentucky's consultation procedures on September 15, 2010 (75 FR 55988). Additionally, DAQ submitted a regional haze plan which outlines its consultation practices with Federal Land Managers. EPA has made the preliminary determination that Kentucky's SIP and practices adequately demonstrate consultation with government officials related to the 1997 annual and 2006 24-hour PM_{2.5} NAAQS when necessary.

10. 110(a)(2)(J) (127 public notification) *Public notification:* The Commonwealth's emergency episode provisions provide for notification to the public when the NAAQS, including the PM NAAQS, are exceeded. Additionally, the Commonwealth reports daily air quality information on its state website at: <http://air.ky.gov/Pages/AirQualityIndexMonitoring.aspx> to inform the public on the existing air quality within the Commonwealth. EPA has made the preliminary determination that Kentucky's SIP and practices adequately demonstrate the Commonwealth's ability to provide public notification related to the 1997 annual and 2006 24-hour PM_{2.5} NAAQS when necessary.

11. 110(a)(2)(J) (PSD) *PSD and visibility protection:* Kentucky demonstrates its authority to regulate new and modified sources of PM to assist in the protection of air quality in Kentucky. Chapter 51 – *Attainment and Maintenance of the National Ambient Air Quality Standards*, describes the permit requirements for new major sources or major modifications of existing sources in areas classified as attainment or unclassifiable under section 107(d)(1)(A)(ii) or (iii) of the CAA. This ensures that sources in areas attaining the NAAQS at the time of designations prevent any significant deterioration in air quality. Chapter 51 also sets the permitting requirements for areas in or around nonattainment areas. As with infrastructure element 110(a)(2)(C), infrastructure element 110(a)(2)(J) Kentucky's SIP does not include provisions to meet all the requirements for NSR/PSD related to the PM_{2.5} standard. As noted above on July 3, 2012, Kentucky submitted a letter to EPA providing a schedule to address outstanding requirements promulgated in the NSR PM_{2.5} Rule related to the PM_{2.5} standard for their PSD program and committing to providing the necessary SIP revision to address its NSR PM_{2.5} Rule SIP deficiencies. As a result, EPA is proposing to conditionally approve Kentucky's infrastructure SIP with respect to element 110(a)(2)(J) in accordance with section 110(k)(4) of

the Act. EPA intends to move forward with finalizing the conditional approval consistent with section 110(k)(4) of the Act.

With regard to the applicable requirements for visibility protection, EPA recognizes that states are subject to visibility and regional haze program requirements under part C of the Act (which includes sections 169A and 169B). In the event of the establishment of a new NAAQS, however, the visibility and regional haze program requirements under part C do not change. Thus, EPA finds that there is no new visibility obligation “triggered” under section 110(a)(2)(J) when a new NAAQS becomes effective. This would be the case even in the event a secondary PM_{2.5} NAAQS for visibility is established, because this NAAQS would not affect visibility requirements under part C. EPA has made the preliminary determination that Kentucky’s SIP and practices adequately demonstrate the Commonwealth’s ability to implement PSD programs and to provide for visibility protection related to the 1997 annual and 2006 24-hour PM_{2.5} NAAQS when necessary.

12. 110(a)(2)(K) *Air quality and modeling/data:* Kentucky Air Regulations Chapter 50 - *General Administrative Procedures*, provides Kentucky with the authority to conduct air quality modeling and report the results of such modeling to EPA. This regulation demonstrates that Kentucky has the authority to provide relevant data for the purpose of predicting the effect on ambient air quality of the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. EPA has made the preliminary determination that Kentucky's SIP and practices adequately demonstrate the Commonwealth's ability to provide for air quality and modeling, along with analysis of the associated data, related to the 1997 annual and 2006 24-hour PM_{2.5} NAAQS when necessary.

13. 110(a)(2)(L) *Permitting fees:* Kentucky addresses the review of construction permits as previously discussed in 110(a)(2)(C) above. Permitting fees are collected through the

Commonwealth's title V fees program, which has been federally approved. EPA has made the preliminary determination that Kentucky's SIP and practices adequately provide for permitting fees related to the 1997 annual and 2006 24-hour PM_{2.5} NAAQS when necessary.

14. 110(a)(2)(M) Consultation/participation by affected local entities: DAQ coordinates with local governments affected by the SIP. Kentucky's SIP also includes a description of the public participation process for SIP development. Kentucky has consulted with local entities for the development of transportation conformity and has worked with the Federal Land Managers as a requirement of its regional haze rule. More specifically, Kentucky adopted State-wide consultation procedures for the implementation of transportation conformity which includes the development of mobile inventories for SIP development and the requirements that link transportation planning and air quality planning in nonattainment and maintenance areas. The state and local transportation agency officials are most directly impacted by transportation conformity requirements and have a requirement to have public involvement for their activities including the analysis which shows how they meet transportation conformity requirements. EPA approved Kentucky's consultation procedures in Chapter 50:066 - *Conformity of transportation plans, programs, and projects (Amendment)*, on April 21, 2010 (75 FR 20180). EPA has made the preliminary determination that Kentucky's SIP and practices adequately demonstrate consultation with affected local entities related to the 1997 annual and 2006 24-hour PM_{2.5} NAAQS when necessary.

V. Proposed Action

As described above, DAQ has addressed the elements of the CAA 110(a)(1) and (2) SIP requirements pursuant to EPA's October 2, 2007, and September 25, 2009, guidance to ensure

that the 1997 annual and 2006 24-hour PM_{2.5} NAAQS are implemented, enforced, and maintained in Kentucky. EPA is proposing to determine that Kentucky's infrastructure submissions, provided to EPA on August 26, 2008, and on July 17, 2012, addressed the required infrastructure elements for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS with the exceptions of elements (C) and (J) (as related to the PSD requirements of this element).

With respect to element 110(a)(2)(E)(ii), EPA is today proposing to determine that Kentucky's SIP satisfies this infrastructure element contingent upon EPA taking final action to approve Kentucky's July 17, 2012, submission requesting approval of KRS Chapters 11A.020, 11A.030, 11A.040 224.10-020 and 224.10-100 into the SIP to address sub-element 110(a)(2)(E)(ii). Today's action is also proposing approval of KRS Chapters 11A.020, 11A.030, 11A.040 224.10-020 and 224.10-100 into the SIP.

With respect to elements 110(a)(2)(C) and 110(a)(2)(J) relating to the PSD requirements, EPA is proposing to conditionally approve these requirements based upon the commitment made by Kentucky to submit the requisite SIP revision to address the Commonwealth's current NSR PM_{2.5} Rule SIP deficiencies. Consistent with section 110(k)(4) of the CAA, if the Commonwealth fails to comply with its commitment, this proposed condition approval would automatically be treated as a disapproval of these elements.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. Accordingly, this proposed action merely

approves state law as meeting federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this proposed rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the Commonwealth, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Particulate Matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: July 20, 2012.

A. Stanley Meiburg,
Acting Regional Administrator,
Region 4.

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